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United Nations Commission on International Trade Law

Thirty-ninth session

Summary record (partial*) of the 821st meeting**
Held at Headquarters, New York, on Monday, 26 June 2006, at 10 a.m.

Temporary Chairman: Mr. Sekolec (Secretary of the Commission)
Chairman: Mr. Abascal Zamora (Chairman of the Committee of the Whole) .. (Mexico)

Contents

Election of officers

Finalization and adoption of legislative provisions on interim measures and the form of arbitration agreement and of a declaration regarding the interpretation of articles II (2) and VII (1) of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards

* No summary record was prepared for the rest of the meeting.
** No summary records were prepared for the 811th to 820th meetings.

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06-40835 (E)

The meeting was called to order at 10.10 a.m.

The discussion covered in the summary record began at 10.40 a.m.

Election of officers

1. **The Temporary Chairman**, noting that the Commission was meeting as a Committee of the Whole for the consideration of agenda item 5, invited members to elect a Chairman.

2. **Mr. Boulet** (Belgium) nominated Mr. Abascal Zamora (Mexico) for the office of Chairman.

3. *Mr. Abascal Zamora (Mexico) was elected Chairman of the Committee of the Whole by acclamation and took the Chair.*

Finalization and adoption of legislative provisions on interim measures and the form of arbitration agreement and of a declaration regarding the interpretation of articles II (2) and VII (1) of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards
(A/CN.9/589, 592, 605, 606, 607 and 609 and Add.1-6)

Draft legislative provisions on interim measures and preliminary orders

Chapter IV bis. Interim measures and preliminary orders

Section 1. Interim measures

Article 17. Power of arbitral tribunal to order interim measures

4. **The Chairman** drew attention to documents A/CN.9/605, 606 and 607, which contained the revised draft legislative provisions on interim measures, the form of arbitration agreement, and the draft declaration regarding the interpretation of article II, paragraph 2, and article VII, paragraph 1, of the New York Convention, respectively, and to documents A/CN.9/609 and Add.1-6, which contained comments received from Member States and international organizations on the draft legislative provisions on interim measures. The Committee also had before it the reports on the forty-third and forty-fourth sessions of the Commission's Working Group II (Arbitration and Conciliation), which were contained in documents A/CN.9/589 and A/CN.9/592, respectively.

5. He invited the Committee to begin its consideration of article 17 of the draft legislative provisions on interim measures, contained in document A/CN.9/605 as draft chapter IV bis. Upon adoption, draft chapter IV bis would be annexed to the 1985 UNCITRAL Model Law on International Commercial Arbitration as a replacement for the current article 17.

6. **Mr. Graham Tapia** (Mexico) said that a degree of progress had been made on the matters before the Committee, reflecting a consensus reached by delegations at previous sessions of the Commission. The interim measures and the form of arbitration agreement were very important issues, which reflected current practice and were the result of an existing need among those who practised arbitration. The documents before the Committee should therefore provide a point of departure for the Committee's work, and the consensus achieved should be maintained.

7. **Mr. Sorieul** (International Trade Law Division) recalled that, in its present form, article 17, paragraph 1, partially reproduced the original article 17. However, Guatemala had suggested that the word "a" should be replaced by the word "any" in the phrase "at the request of a party".

8. **Mr. Castello** (United States of America) wondered whether the amendment suggested by Guatemala might imply the involvement of a third party. It should be made clear that the words "a party" in fact referred to "a party to the proceedings", and he would therefore prefer to retain the text as adopted by the Working Group.

9. **Ms. Kirby** (Observer for the International Chamber of Commerce) supported the comments of the representative of the United States.

10. **The Chairman** said he took it that the Committee wished to adopt article 17, paragraph 1, without amendment.

11. *It was so decided.*

12. **The Chairman** said that, as reflected in paragraph 6 of document A/CN.9/605, the Working Group had previously decided that, to the extent that all the purposes for interim measures were generically covered by the revised list contained in article 17, paragraph 2, the list of possible grounds for which an

interim measure might be granted could be expressed as an exhaustive one. The Working Group had further stated that the Commission might wish to note its decision in any explanatory material accompanying article 17, paragraph 2.

13. **Mr. Bellenger** (France) recalled his delegation's previously stated position that the measures set forth in article 17, paragraph 2 (b), should not be included in article 17. During the discussion in the Working Group, a number of delegations had raised the question of the principle involved in the measures set forth in article 17, paragraph 2 (b), which was detrimental to another, fundamental, principle, according to which a party should not be deprived of a jurisdictional remedy to which it was entitled. His delegation would therefore request that a comment be included in the report of the thirty-ninth session, to the effect that article 17, paragraph 2 (b), was a derogation from the rule.

14. **Mr. Möller** (Observer for Finland) said that his delegation also wished a note to be included in the Commission's report.

15. **The Chairman** recalled that the Working Group had engaged in a lengthy debate on article 17, paragraph 2 (b), but had decided to retain it. However, the comment of the representative of France would be included in the report on the Commission's thirty-ninth session. He took it that the Committee did not object to the text of paragraph 6 of document A/CN.9/605, and that it wished to adopt article 17, paragraph 2, without amendment.

16. *It was so decided.*

Article 17 bis. Conditions for granting interim measures

17. **The Chairman** invited the Committee to begin its consideration of article 17 bis of the draft legislative provisions.

18. **Mr. Graham Tapia** (Mexico) said that in article 17 bis, paragraph 1, the English words "shall satisfy" had been incorrectly rendered in Spanish as "deberá aportar". He trusted that it would be possible to amend the Spanish text during a future meeting of a drafting committee.

19. **Mr. Sorieul** (International Trade Law Division) said that it would not be possible to form a drafting committee to finalize the text, and he would therefore invite delegations to notify the Secretariat, in writing, of any translation problems.

20. **Mr. Li** Wenzhu (China) recalled that his delegation had suggested the deletion of article 17 bis, paragraph 1 (b), on the grounds that, since interim measures were generally of a very urgent nature, it made no sense to delay the procedure.

21. **Mr. Dervaird** (United Kingdom) said that it was a necessary safeguard, for the granting of interim measures, that there should be at least a degree of belief in the mind of the arbitral tribunal that there was merit in the claim being made by those seeking the interim measure. He would therefore consider that paragraph 1 (b) might be qualified by an expression such as "prima facie". The amended text of paragraph 1 (b) would thus begin: "Prima facie, there is a reasonable opportunity that ...".

22. **Ms. Kirby** (Observer for the International Chamber of Commerce) said that, while she endorsed in the main the previous speaker's comments, she could not support adding a prima facie standard to the level of proof that must be provided to satisfy an arbitral tribunal. The wording of paragraphs 1 (a) and 1 (b) was the product of considerable discussion in the Working Group. Moreover, there had been some debate as to whether or not there should be any qualification of the word "satisfy" in the chapeau of paragraph 1, and the Working Group had decided not to establish any standard in that regard. She was inclined to believe that the text should not be amended.

23. **Mr. Möller** (Observer for Finland) said that he, too, agreed with the substance of the comments made by the representative of the United Kingdom but would prefer not to add the words "prima facie".

24. **Mr. Graham Tapia** (Mexico) said that in paragraph 1 (a) the word "substantially" introduced an unnecessary requirement and should therefore be deleted. It was when the measure was being considered that one had all the necessary elements on hand for deciding whether or not to grant an award for damages. To include the additional burden of having to "substantially" outweigh the harm that was likely to result would be an unnecessary obstacle to the granting of the measure.

25. His delegation wished to raise a number of translation issues and would submit suggestions to the Secretariat, as requested by the representative of the International Trade Law Division.

26. **Mr. Uzelac** (Croatia) said that the Commission should adopt the text as drafted, since it was doubtful that the careful formulation of article 17 bis, paragraphs 1 (a) and (b), could be further improved, given the difficulty that the Working Group had had in reaching that formulation. While the difficulties of translating standards of proof and of aligning the various language versions of the text had been taken into consideration, it was practically impossible to achieve a simple, easily translatable formulation. In drafting the text, the Working Group had borne in mind that the concepts embodied in article 17 bis would in any case have to be brought into line with the relevant national laws of States who adopted the Arbitration Model Law; specifically, the provisions of article 17 bis would need to be adapted to the particular standards of proof established under those laws. Comments to that effect could be provided in the explanatory material, which was vital as an interpretative instrument that in future would enable the Commission to retrace the steps whereby it had reached the formulation of the new provisions and to offer guidance to those States that would be implementing them.

27. **The Chairman**, referring to the comment made by the observer for the International Chamber of Commerce regarding the chapeau of paragraph 1, recalled that the Working Group had deliberately chosen the words "shall satisfy" in order to avoid implying a burden of proof. It was important that that rationale should be noted in any explanatory material.

28. **Mr. Rodríguez** (Observer for the Federación Latinoamericana de Bancos) said that the use of the words "demanda" and "demandante" throughout the Spanish text of chapter IV bis was inconsistent with the corresponding English text. He therefore proposed that the word "demanda" be replaced with the word "requirimiento" or "petición" to correspond to the English "requirement" and "request", respectively, and that, accordingly, the word "demandante" be replaced with "requiriente" or "peticionante".

29. **The Chairman** said that all matters relating to the drafting and alignment of the various language versions should be submitted to the Secretariat in writing. The Spanish-speaking delegations should reach agreement on the matter raised by the observer for the Federación Latinoamericana de Bancos before making any proposal in that regard.

30. **Mr. López** (Chile) endorsed the proposal to delete the word "substantially" in paragraph 1 (a), since it significantly altered the meaning of the text to imply the imposition of an additional requirement that would need to be fulfilled in order for a request for an interim measure to succeed.

31. **Mr. Li** Wenzhu (China) endorsed the proposal by the representative of the United Kingdom relating to prima facie evidence as a viable alternative to the deletion of paragraph 1 (b). Drawing attention to the fact that there were some inconsistencies between the English and Chinese versions of the text, he expressed the hope that the translation of the text would be improved so as to ensure alignment of the various language versions.

32. **Mr. Komarov** (Russian Federation) said that the wording of article 17 bis should be retained in order to preserve the carefully balanced formulation achieved by the Working Group, particularly given the importance of the principle established in the chapeau of paragraph 1 and in paragraph 1 (a). In that regard, the word "substantially" was of fundamental importance, since, if it was deleted, the concept would be fundamentally altered.

33. **Ms. Kirby** (Observer for the International Chamber of Commerce) said that she did not support the proposal to delete the word "substantially" in paragraph 1 (a), nor did she accept the suggestion that the purpose of article 17 as drafted was to make it easier to obtain interim measures of protection. Rather, it was her understanding that the purpose was to clarify the circumstances under which interim measures might be granted, the types of interim measures that might be granted and the standards that an arbitral tribunal should employ when evaluating an application for such measures. Moreover, most legal systems set high standards for obtaining interim measures of protection and treated the granting of such measures as extraordinary. The text that the Working Group had developed through lengthy and extensive negotiations reflected those considerations.

34. **Mr. Castello** (United States of America) said that his delegation opposed both the deletion of paragraph 1 (b) and the alternative proposal to introduce the expression "prima facie", and in that regard it associated itself with the comments made by the observer for the International Chamber of Commerce. While he understood the concerns raised by the

delegations of the United Kingdom and China, the wording of article 17 bis reflected the extremely careful consideration of the Working Group in its attempt to balance the various concerns raised. The use of the words "shall satisfy" in the chapeau of paragraph 1 had been intended to avoid being too specific regarding any burden of proof and to leave it to the judgement of the tribunal to apply that framework sensibly. That was one of several reasons why it would be a mistake to introduce in paragraph 1 (b) the term "prima facie", which would probably have different connotations in different legal systems and would in any case add a new level of complexity and imply a burden of proof.

35. In that context, he recalled that the Working Group had agreed on the phrase "reasonable possibility" in paragraph 1 (b) in order to balance, on the one hand, the concern that the original wording might impose an excessive burden and oblige tribunals to prejudge the merits of the claim and, on the other, the undesirability of situations in which tribunals granted interim measures to a party when they did not believe that that party had at least a reasonable possibility of success on the merits of the claim.

36. Responding to the concern expressed by the Chinese delegation that fulfilment of the conditions established in paragraph 1 would delay proceedings, he recalled that section 1 had been drafted with an awareness of the prevailing practice in most legal systems, whereby courts routinely considered the likelihood of success on the merits of the claim when evaluating a request for an interim measure. It was widely understood that that judgement was preliminary and based on the evidence that had been established up to that point.

37. His delegation therefore favoured retaining article 17 bis as drafted and in general associated itself with the comments made by the representative of the Russian Federation and the observer for the International Chamber of Commerce.

38. **Mr. Schneider** (Observer for the Swiss Arbitration Association (ASA)) said that, while accepting the comment made by the observer for the International Chamber of Commerce that the purpose of the word "substantially" in paragraph 1 (a) was not to facilitate the granting of interim measures but rather to provide an adequate system for such measures, he considered that the word implied prejudgement of the outcome of the request. The criteria expressed in paragraph 1 (a) for assessing the balance of convenience were already established in arbitral practice, but the precise manner in which they were applied was something that should be left to arbitral practice to develop and resolve as appropriate. His delegation therefore proposed the deletion of the word "substantially".

39. Regarding paragraph 1 (b), his delegation understood the concern expressed by the Chinese delegation that it was difficult for an arbitral tribunal to base its determination on a possible outcome without prejudging that outcome. However, since many delegations had agreed that it was necessary for the tribunal to form an opinion that had at least a reasonable possibility of prevailing before it imposed on a party the burden of an interim measure, the condition established in paragraph 1 (b) should not be removed. Given the impossibility of further improving the way in which that condition was expressed, he supported paragraph 1 (b) as drafted.

40. **Mr. Graham Tapia** (Mexico) said that the second part of paragraph 1 (b), beginning with the words "provided that", appeared to establish a condition, whereas it was the understanding of his delegation that that was not the intended sense of the text. Rather, the Working Group had envisaged the second part of the paragraph as ensuring that the arbitral tribunal did not lose its decision-making power with respect to an interim measure. In order to clarify that point, he proposed that the two parts of paragraph 1 (b) should form two separate sentences, to read: "There is a reasonable possibility that the requesting party will succeed on the merits of the claim. The determination on this possibility shall not affect the discretion of the arbitral tribunal in making any subsequent determination."

41. **Mr. Martens** (Germany) expressed support for the wording proposed by the representative of Mexico and for the rationale given for that proposal.

The meeting was suspended at 11.45 a.m. and resumed at 12 noon.

42. **Ms. Kirby** (Observer for the International Chamber of Commerce) said that, while it was true that the inclusion of the word "substantially" in paragraph 1 (a) created an additional burden for the requesting party, the wording was sufficiently flexible to allow arbitral tribunals to reach a judgement in the context of

each particular case. The standards set out in that article also applied to preliminary orders and should therefore be retained.

43. **Mr. Castello** (United States of America) said that the proposal regarding paragraph 1 (b) made by the representative of Mexico, supported by the representative of Germany, was persuasive. He could agree to the deletion of the words "provided that" if it did not affect substantively the provisions agreed on in the Working Group but simply clarified their meaning.

44. **Mr. Schneider** (Observer for the Swiss Arbitration Association) likewise supported the Mexican proposal regarding paragraph 1 (b). As for the use of the word "substantially" in paragraph 1 (a), he did not think that the principle of an additional burden had ever been accepted, either in the Working Group or in the current assembly; hence, it could not be relied on. The party requesting an interim measure must convince the tribunal that harm would be caused if the measure was not ordered, and the respondent would then have the opportunity to show that there would be a burden. To say that the burden must substantially outweigh the harm that would otherwise result would be to introduce an undesirable element. He therefore urged the removal of the word "substantially".

45. **Mr. Bellenger** (France) said that he was in favour of the text of paragraph 1 (a) remaining unchanged.

46. **The Chairman** said that, if he heard no objection, he would take it that the text of paragraph 1 (a) should remain unchanged and that the Mexican proposal in respect of paragraph 1 (b) should be adopted.

47. *It was so decided.*

48. **The Chairman** drew attention to the question raised in paragraph 9 of document A/CN.9/605 as to whether it would be appropriate to provide guidance in explanatory material regarding the impact of urgency.

49. **Mr. Schneider** (Observer for the Swiss Arbitration Association) said that urgency should not be required in all situations. The need for urgency arose in regard to the preservation of evidence and also to cases where the object of the interim measure was to preserve the status quo. As a general requirement, urgency was not a suitable criterion.

50. **The Chairman** suggested that the Secretariat should expressly state in the explanatory material that the Working Group did not consider the need for urgency to be essential for the granting of an interim measure.

Section 2. Preliminary orders

Article 17 ter. Applications for preliminary orders and conditions for granting preliminary orders

51. **The Chairman** said that, as he took it that there was no objection to the wording of article 17 ter, paragraphs 1, 2 and 3, the article as a whole could be adopted in its current form.

52. *It was so decided.*

Article 17 quater. Specific regime for preliminary orders

53. **Mr. Dervaird** (United Kingdom) wondered what would happen under article 17 quater, paragraph 2, when there were several parties to an arbitration. He proposed that, since the other parties should also be given an opportunity to present their case, the words "or to any other party to the arbitration" should be inserted after the words "against whom a preliminary order is directed".

54. **Mr. Schneider** (Observer for the Swiss Arbitration Association) said that the only party concerned was the one against whom the preliminary order was directed. He suggested, as an alternative wording, "any party affected by a preliminary order".

55. **Ms. Kirby** (Observer for the International Chamber of Commerce) suggested that the word "or" in the insertion proposed by the representative of the United Kingdom should be replaced by "and".

56. **Mr. Schneider** (Observer for the Swiss Arbitration Association) said that, in order to guard against undue complication of the procedure, it might be wiser to say "the arbitrary tribunal shall give an opportunity to any party affected by a preliminary order to present its case", with each party having to justify how it was affected.

57. **The Chairman** said that the general rule in any arbitration was that all communications were addressed to all parties. In article 17 quater, the object of the special regime, where a communication was not addressed to all parties, was to guard against any measures that might frustrate action. Under the normal

arbitration regime, the communication was addressed to all parties and they all had the right to react.

58. **Mr. Castello** (United States of America) said it was clear from the wording of paragraph 1 that notice of the request for a preliminary order went to all the parties and that all the parties could be expected to have a chance to respond. Paragraph 2, however, made a special provision, under the safeguards regime, for the party against whom the order was directed to be able to present its case at the earliest practicable time. Any change to the wording would upset the careful balance achieved in the paragraph and go beyond the intention that lay behind it. He expressed the opinion that the paragraph should stand unchanged.

59. **Mr. Möller** (Observer for Finland) endorsed that view.

60. **Mr. Uzelac** (Croatia) said he agreed that the text should not be changed. In his opinion, the situation covered by article 17 quater did not constitute an exception to the rule that communications in arbitral proceedings should be directed to all the parties. In general, once a preliminary order had been issued, all the parties to the proceedings had the right to react, including the party against whom the order was directed. He supported the opinion that the paragraph constituted an additional safeguard, emphasizing the need for a swift reaction by the tribunal that had issued the order. Regarding the additional phrase suggested by the representative of the United Kingdom, he cautioned against any wording that could be interpreted as suggesting that the preliminary order should be addressed to persons that were not parties to the proceedings. His delegation preferred the wording proposed by the Swiss Arbitration Association. The Commission should consider the case of multiparty arbitration, bearing in mind that difficulties could ensue in cases where preliminary measures that could affect other respondents were directed against only one party.

61. **The Chairman** said that there was insufficient time to make further proposals. The best solution was to leave the text as it stood and to explain in the commentary that the object of the provision was to establish a safeguard.

62. **Mr. Markus** (Switzerland) said that his delegation was in favour of maintaining the current wording for reasons already given by other delegations. He agreed with the Chairman that an explanation should be provided in the commentary.

63. **Ms. Kirby** (Observer for the International Chamber of Commerce) supported the solution advocated by the Chairman. While under article 17 quater, paragraph 2, only the party against whom the preliminary order was directed would be invited to present its case, her understanding was that all the other parties would receive copies of that invitation and would have an opportunity to react even though not specifically invited to do so.

64. **Mr. Dervaird** (United Kingdom) said that the invitation to present its case should be addressed to every party to an arbitration. While it was doubtless correct to assume that parties would react whether or not they received an invitation, the contrast between "all parties" in paragraph 1 and the very specific "party against whom a preliminary order is directed" in paragraph 2 left doubt as to whether all the parties were entitled to present their cases to the arbitral tribunal. The same point arose in the last sentence of paragraph 4. The current wording could lead to a situation in which the only party that appeared to be able to present a case about the modification or withdrawal of an order was the party directly affected, which would seem to restrict the proceedings of an arbitral tribunal.

65. **Mr. Özsunay** (Turkey) supported the wording suggested by the observer for the Swiss Arbitration Association.

66. **Mr. Sharif** (Qatar) suggested that it might be desirable to provide for the right of the parties to object to preliminary orders and to be given time to acquaint themselves with the orders. To that end, the principle of a meeting between the adversary parties might usefully be provided for.

67. **Ms. Perales Viscasillas** (Spain) said that it was not necessary to amend paragraph 2, since the arbitral tribunal had to give the party against whom the preliminary order was directed the opportunity to present its case. That was an expression of the principle embodied in article 18 of the Arbitration Model Law, concerning equal treatment of parties. The goal of paragraph 2 was to emphasize that the party against whom the preliminary order had been directed should present its case at the earliest practicable time. Furthermore, the possibility for other affected parties to present their views was contemplated in paragraph 3, in which the reference to "any objection" included objections by third parties that could be affected

indirectly by the preliminary order. Other paragraphs in the article would require significant redrafting if reference to other parties was included in paragraph 2.

68. **Mr. Komarov** (Russian Federation) said that the preliminary order was of an exclusive nature and should not be subjected to rules that applied to ordinary orders. If provision was made for all parties to respond, the arbitral tribunal might then have to state its position on numerous statements and the process would become unduly long. The current wording of the paragraph incorporated the concept of the exclusive nature of the preliminary order and on that basis, the establishment of a special regime. It should therefore not be amended.

69. **Mr. Boulet** (Belgium) was in favour of maintaining the current text. It covered the questions that had been raised and gave priority to the party against which the preliminary order was directed, as was justified. The text did not exclude the right of other parties to object.

70. **The Chairman** said he took it that the Commission wished to maintain the text of paragraph 2 as it stood. The commentary should include a clarification to the effect that paragraph 2 was a safeguard that did not derogate from the general principle that communications in arbitration were addressed to all parties and that any party to the arbitration had the right to react.

71. *It was so decided.*

72. **Mr. Bellenger** (France) said that he had a reservation in regard to paragraph 5. There seemed to be no point in seeking a preliminary order if it could not be enforced by a court. He suggested that the second part or indeed the whole of the first sentence should be deleted.

73. **The Chairman** said that the principle that preliminary orders should not be subject to enforcement by a court was an essential part of the entire package of preliminary orders as agreed. If that sentence was deleted, it would impair the balance achieved by the Working Group, which had considered that preliminary orders were so short-lived that there would not be time for the courts to enforce them.

74. **Mr. Li Wenzhu** (China) said that it followed logically that if an order was binding it should be enforceable by a court. He was therefore in favour of the deletion of the second part of the first sentence.

75. **The Chairman** recalled the debate in the Working Group, which had concluded that to make a preliminary order enforceable by the courts would put out the wrong message; it had therefore made clear that such an order would be binding on the parties.

76. **Ms. Kirby** (Observer for the International Chamber of Commerce) said that any change to the wording of paragraph 5 would defeat the purpose of the Commission's work and she would therefore oppose it.

77. **Mr. Dervaird** (United Kingdom) said that, while paragraph 5 and section 4 concerning the recognition and enforcement of interim measures provided that a preliminary order should be binding on the parties, it was unclear from what point in time it should be binding. Given the provision in article 17 sexies that the arbitral tribunal could require that security be provided in connection with a preliminary order, it was necessary to clarify whether a preliminary order was binding before the security was in place or not.

78. **The Chairman** said that the arbitral tribunal could require security before, during or after the interim measure or preliminary order entered into force. It would therefore be possible for a preliminary order to be binding before security was given.

The meeting rose at 1 p.m.